

*Carroll & Carroll Lawyers, P.C.*

*Counselors & Attorneys at Law*

*Since 1905*

2013 JUL 23 A 3:48

REGIONAL HEARING  
CLERK

*Lee Carroll (1904-2004)*  
*John Benjamin Carroll, P.C.*  
*Woodruff Lee Carroll, P.C.*

*Julia M. Zimmer Paralegal*

July 19, 2013

Via US Mail

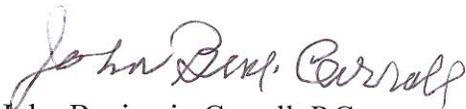
Regional Hearing Clerk  
US Environmental Protection Agency  
290 Broadway, 16th Floor  
New York, NY 10007

Re: Docket No. CWA-02-2013-3601

Dear Clerk,

Enclosed please find an original and two copies of the Reply Affidavit to Answering Affidavit of the Agency on the Respondent's motion to dismiss with exhibits, and an Affidavit of Service in the above reference matter.

Very Truly Yours.



John Benjamin Carroll, P.C.

JBC/jmz

Enc.

cc: (one copy each)

Lauren Fischer, Esq.

Assistant Regional Counsel

US Environmental Protection Agency

290 Broadway, 16th Floor

New York, NY 10007

Joan Leary Matthews,

Director Clean Water Division

US Environmental Protection Agency

290 Broadway, 16th Floor

New York, NY 10007

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 Broadway  
New York, New York 10007

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.II  
2013 JUL 23 A 3:46  
REGIONAL HEARING  
CLERK

IN THE MATTER OF:

**Michael B. Rapasadi**  
2106 Lake Road  
Oneida, NY 13421

**Thomas R. Rapasadi**  
2106 Lake Road  
Oneida, NY 13421

Respondents.

**Proceeding pursuant to § 309(g)  
of the Clean Water Act, 33 U.S.C. § 1319(g)**

**Proceeding to Access Class I  
Civil Penalties Pursuant to Section  
309(g) of the Clean Water Act**

**Docket No. CWA-02-2013-3601**

**AFFIDAVIT OF MAILING**

I, Julia Zimmer, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age, and resides in Syracuse, NY 13206.

That on the 19<sup>th</sup> day of July, 2013 deponent served copies of Reply Affidavit to Answering Affidavit of the Agency on the Respondent's motion to dismiss with exhibits, in the above reference matter to:

(Original and two copies)  
Regional Hearing Clerk  
US Environmental Protection Agency  
290 Broadway, 16th Floor  
New York, NY 10007

(Additional Copies)  
Lauren Fischer, Esq.  
Assistant Regional Counsel  
US Environmental Protection Agency  
290 Broadway, 16th Floor  
New York, NY 10007

Joan Leary Matthews,  
Director Clean Water Division  
US Environmental Protection Agency  
290 Broadway, 16th Floor  
New York, NY 10007

by depositing same enclosed in a postpaid properly addressed wrapper, with Express Mail postage, in a post office-official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

  
\_\_\_\_\_  
Julia Zimmer

Sworn to before me this  
19<sup>th</sup> day of July, 2013

  
\_\_\_\_\_  
Notary Public

JOHN BENJAMIN CARROLL  
Notary Public, State of New York  
Qualified in Madison County No. 02CA4984904  
My Commission Expires August 5, 2017

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY 2013 JUL 23 A 3:45  
REGION 2  
290 Broadway  
New York, New York 10007  
REGIONAL HEARING  
CLERK

IN THE MATTER OF:

**Michael B. Rapasadi**

2106 Lake Road  
Oneida, NY 13421

**Thomas R. Rapasadi**

2106 Lake Road  
Oneida, NY 13421

Respondents.

**Proceeding pursuant to § 309(g)  
of the Clean Water Act, 33 U.S.C. § 1319(g)**

**Proceeding to Access Class I  
Civil Penalty Pursuant to Section  
309(g) of the Clean Water Act**

**Docket No. CWA-02-2013-3601**

REPLY AFFIDAVIT TO ANSWERING AFFIDAVIT OF THE AGENCY  
ON THE RESPONDENTS' MOTION TO DISMISS

John Benjamin Carroll, first being july sworn deposes and says:

- 1) I am counsel to the Plaintiffs and make this affidavit as a Reply to the Answering Affidavit of the agency.
- 2) We have received some material requested. There is a clear admission in the document attached at "Exhibit A" hereto that at the time of the actions claimed against the Respondents, the premises were not designated wetlands. Thus, there was no notice to the respondents that he could not use the land as he pleased. In "Exhibit A", Aaron C. Smith states:

"The Canastota, NY NWI map does not identify any mapped wetland within the area of the investigation however there are multiple mapped wetlands west and southwest of the site."

## **Site Visit Notes/Rationale**

**Author:** Aaron C. Smith

**Site Name/Location:** Rapasadi, Michael – North Main Street Road, Town of Lenox, Madison County, New York

### **Background:**

On September 23, 2010 I received a “Record of Complaint” from Julie Rimbault concerning property located on Main Street Road North, north of the Village of Canastota. Ms. Rimbault along with other Corps staff as well as USEPA staff observed the site passing by on the road. Ms. Rimbault alleged that fill was being discharged into a potential wetland. Photographs provided by Ms. Rimbault show a fill pad with signs requesting additional fill.

The site is located on the west side of North Main Street Road, north of Colton Road and south of Pine Ridge Road, in the Town of Lenox, Madison County, New York. The site is bordered by North Main Street Road to the east and former agricultural lands to the north, west and south. The entire parcel is approximately 13-acres in size.

The Canastota, NY U.S.G.S. quadrangle identifies the site as flat with no immediate change in topography to either side of the site. Two ditch features are identified within or directly adjacent to the site to the west. These ditches are part of a large ditch complex mapped on both sides of North Main Street Road. These ditches are indicators of agricultural land use throughout the area. An unnamed perennial stream is shown south of the site flowing west into Cowaselon Creek, a perennial stream which flows northwest into Oneida Lake. The mapped ditch complex appears to flow to the north into Childs Ditch, a perennial stream, which also flows into Cowaselon Creek.

The Canastota, NY NWI map does not identify any mapped wetlands within the area of investigation however there are multiple mapped wetlands west and southwest of the site. The aforementioned water bodies and ditches are also identified on this map.

The Madison County Soil Survey, Sheet 9 indicates that the site contains the following soil types; Willette muck (Ww), Fonda mucky silt loam (Fo), and Lakemont silt loam (Lk). Each of these soil types are listed as being hydric for Madison County. None of the ditches are mapped on the soil survey however the unnamed tributary and Cowaselon Creek are identified.

NYS GIS Clearinghouse website aerial photographs were observed from 2009, 2003 and 1994-1999. Based upon a review of these photographs, the site has experienced little change over the review period. Although evidence of ditching and agricultural use is widespread in the vicinity of the site, there is no indication of any ditching or farming on the property in question. The site contains dark signature features throughout this period of review however the most obvious being in the 2009 photo adjacent to fill that appears to have been placed to access the site from the road. It is important to note that the vegetation cover type appears to be consistent throughout the site. There are water features identified just west of the site on both the 2003 and

## **Exhibit A**

2009 photographs. These features appear to have been excavated sometime prior to the 2003 photograph. The unnamed tributary to Cowaselon Creek to the south of the site is shown as containing water throughout the photo review period.

An aerial photograph from *Bing.com* depicts the site as containing many wet signatures throughout. Very prominent wet signatures are visible in the central portion of the site. There was no date listed for this photograph.

Based upon this information I sent a "Warning Letter" to the landowner, Mr. Michael Rapasadi on September 28, 2010. Landowner information was obtained from Madison County tax records. The "Warning Letter" was returned to me by the post office as they were unable to obtain a signature from the addressee.

On October 14, 2010 I left a message at the number listed on signage located on the site. On October 25, 2010 I was able to get through to Mr. Thomas Rapasadi, father of Michael Rapasadi. Mr. Rapasadi informed me that he had purchased the property in 2007 and checked with the Town of Lenox with regard to wetlands. He informed me that the Town indicated that there were no wetlands on the site. At that point Mr. Rapasadi began stripping muck from the site and subsequently backfilling the site. We agreed to meet on-site on November 15, 2010.

## FINDINGS

I met with the property owner on-site on Monday, November 15, 2010. The landowner informed me that he had purchased the property in 2007 and shortly thereafter had begun stripping all of the muck from approximately 4-acres of the site and had begun backfilling with various materials within the past year. Mr. Rapasadi indicated that, "the property was too wet to do anything else, so I decided to fill it in." He did not immediately acknowledge a purpose for the fill but then stated that he was going to either sell the property or allow his son to build on it. At the time of visit the central portion of the site had been filled. Signs had been constructed indicating that fill was wanted for the site. Mr. Rapasadi explained that people dumped the fill in the central portion of the site and then he spread the material with a bulldozer. Currently, the northern and southern portions of the site had not been filled. The organic muck soils that were stripped from the site were stockpiled around the perimeter of the site. Currently, the fill pad was approximately 2-3 feet in depth and consisted primarily of dirt. There were piles of concrete and asphalt on top of the fill pad. I hand delivered the returned "Warning Letter" to Mr. Rapasadi at this meeting.

Because the disturbed area was devoid of vegetation and the natural upper layer of soil I focused my investigation on the adjacent, undisturbed portions of the property. The dominant cover-type of the undisturbed portion of the property surrounding the disturbed area was emergent/scrub-shrub in nature. There were a handful of trees scattered along the western boundary of the site. I began my investigation on the southern end of the site. Dominant vegetation was determined to be; *Cornus amomum* (FACW), *Cornus stolonifera* (FACW), and *Cornus racemosa* (FAC) in the shrub layer, with *Aster lateriflorus* (FACW), *Euthamia graminifolia* (FAC), *Calamagrostis canadensis* (FACW) and *Epilobium hirsutum* (FACW) in the herb stratum. The only tree species noted on-site was *Acer negundo* (FAC). It should be noted that upon investigating the western

photograph. The area plotted was determined to be approximately 1.13-acres in size. In addition, the muck that was scraped from the site has been stockpiled around and within the perimeter of the wetland. An exact calculation of the footprint of these stockpiles was not able to